INDEX

CITATIONS

675044—45 — 1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 520

ALLEN POPE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 63–110) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 1, 1945 (R. 146). The petition for a writ of certiorari was filed on October 18, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, and Section 4 of the Special Act of February 27, 1942 (56 Stat. 1122).

QUESTION PRESENTED

Whether the Special Act of February 27, 1942, required the court below to award petitioner compensation for the removal of material which caved in over the arch of the tunnel being constructed under contract with the United States, in addition to compensation awarded him for filling the caved-in spaces with "dry-packing" and "grout."

STATUTE INVOLVED

The Special Act of February 27, 1942 (56 Stat. 1122), is set forth in the Appendix, *infra*, pp. 17–18.

STATEMENT

In 1924 the petitioner entered into a contract with the United States to construct a subterranean tunnel as part of the water supply system for the District of Columbia (R. 9–46, 110, 122; *Pope* v. *United States*, 76 C. Cls. 64, 78).[1] The work was completed in 1927 (R. 47). The contract permitted the use of "dry-packing" and "grouting" in certain areas surrounding the tunnel where cavities were left by the excavation (R. 43, 124; 76 C. Cls. 64, 80). To "dry-pack" an area, rocks of medium size are packed tightly into the inter-

[1] 76 C. Cls. 64 refers to the findings of fact and opinion of the Court of Claims, concerning the claims here involved, rendered in 1932 in Court of Claims Case No. K–366, referred to in Section 3 of the Special Act, Appendix, *infra*, p. 18. The findings in that case (R. 110–122) were made a part of the findings herein by reference (R. 63).

stices in the ground; then "grout" (concrete of the consistency of soup) is pumped in, which, when it hardens, welds the rocks into a solid mass (R. 122–123; 76 C. Cls. 64, 78–79).

During the course of the work, there was constant disagreement as to the amount of dry-packing and grouting for which petitioner should be paid (R. 122–129; 76 C. Cls. 64, 78–86). The drawings accompanying the contract designated, by a so-called "B" line, the outer limits of excavation for which payment would be made (R. 30; *Pope* v. *United States,* 323 U. S. 1, 5). Where the tunnel passed through solid rock, the Government refused to pay for any dry-packing or grouting except such as had been placed within the "B" line, *i. e.,* between the outer masonry wall of the tunnel and the outside limits of compensable excavation (R. 116, 127–129; 76 C. Cls. 64, 72, 84–85). In the other sections of the tunnel, the Government paid only for such packing and grouting as its calculations, based upon measurements of the area, showed to have been placed above the crown of the tunnel arch (R. 110–116, 124–129; 76 C. Cls. 64, 65–72, 80–84). The contractor, on the other hand, claimed compensation for whatever dry-packing and grouting he had done on the project, regardless of where it was placed (R. 125–126, 129; 76 C. Cls. 64, 81–82, 86). Certain changes made by the Government's contracting

officer also resulted in disagreements. The contracting officer lowered the "B" line by three inches, thus decreasing the area to be excavated, and also directed the omission of a quantity of "lagging" (timbered supports used on the side walls of certain sections of the tunnel). Cave-ins from the sides occurred, requiring that the caved-in materials be removed and that the spaces be filled with dry-packing and grout. Petitioner attributed the cave-ins to the omission of the lagging and sought to be compensated for the extra work consequent thereon. (R. 118–119, 139–140; 76 C. Cls. 64, 74–75, 96–97.)

Because of these disputed sums and others not now material, petitioner sued in the Court of Claims (Case No. K–366) to recover $306,825 for breach of contract (R. 47). After a full trial, the court made findings of fact (R. 110–122) and rendered an opinion (R. 122–145) dealing with the issues involved (76 C. Cls. 64, 78–102). The court denied recovery for the additional work consequent upon the changes made by the contracting officer because they had not been ordered in writing as required by the contract (R. 139–142; 76 C. Cls. 64, 96–99). The court also denied recovery for the additional dry-packing and grouting (R. 122–129; 76 C. Cls. 64, 78–86). However, on the other items of claim not here material, recovery was allowed in the sum of $45,174.46 (R. 47, 64, 122, 145; 76 C. Cls. 64, 78, 102).

With respect to the claim for dry-packing and grouting, the petitioner had no measurement of the space so treated by him, but, predicating the amount of his claim on the "liquid method" measurement, based upon the number of bags of cement used, he sought to recover for dry-packing 5,561 cubic yards at the rate specified in the contract (R. 128–129; 76 C. Cls. 64, 85–86). The Court of Claims, however, while of the opinion that the Government had "received the benefit" of the dry-packing actually done and the grouting in the dry-packed areas (R. 128; 76 C. Cls. 64, 84; 323 U. S. 1, 6) and that the Government was liable for whatever dry-packing had been done and for so much of the grout as had actually found its way into the dry-packed areas (R. 129; 76 C. Cls. 64, 86), refused recovery because of the deficiency in proof as to the extent of the areas so treated (R. 129; 76 C. Cls. 64, 86). Four motions for a new trial were made and denied (76 C. Cls. 64; 81 *id.* 658; 86 *id.* 18; 100 *id.* 375, 390), and a petition for a writ of certiorari was denied (303 U. S. 654). The judgment of $45,174.46 recovered by petitioner was duly paid (R. 48).

On July 7, 1942, pursuant to the Special Act approved February 27, 1942, (Appendix, *infra*, pp. 17–18; R. 1–2, 48–49; 323 U. S. 1, 3–4), petitioner instituted the present proceeding to recover $162,616.80, the total amount alleged to be due at contract prices for all the excavating, concret-

ing, dry-packing, and grouting which had not previously been paid for (R. 1–9; *Pope* v. *United States,* 100 C. Cls. 375, 390–392). Petitioner sought recovery for (1) the excavation of 57 cubic yards of caved-in material between the original "B" line and the "B" line as lowered by the contracting officer; (2) the excavation of 287 cubic yards of materials which caved in from the side walls because of the omission of side-wall lagging; (3) concreting the caved-in side-wall cavities; and (4) dry-packing and grouting caved-in spaces over the tunnel arch (R. 4, 6–8, 64–65); all of which claims had previously been asserted by petitioner in Case No. K–366 and disallowed therein by the Court of Claims (R. 64–65, 110–114, 116, 118–119; 76 C. Cls. 64, 65–70, 72, 74–75). Petitioner also sought recovery for the "excavation" of 4,781 cubic yards of materials which caved in over the tunnel arch,[2] at $17 per yard (R. 4–6, 8, 64). This claim as to excavation had not been asserted as such in Case No. K–366 (R. 64, 110–122).

---

[2] Petitioner arrived at this number of yards on the theory that "the extent of the caved-in spaces is accurately determined from the coextensive volume of spaces drypacked and grouted" (R. 6). From the 5,561 cubic yards claimed by petitioner to have been drypacked (*supra*); R. 6, 129; 76 C. Cls. 64, 86), the petitioner has deducted the 57 cubic yards included in item (1), *supra*, and 723 cubic yards as to which petitioner's claim was allowed in Case No. K–366 (R. 6, 64, 118; 76 C. Cls. 64, 74).

A hearing was held before a commissioner, but the court below made no findings of fact (100 C. Cls. 375, 393), and dismissed the petition on the ground that the Special Act was unconstitutional (R. 47–60; 100 C. Cls. 375) as a legislative "encroachment by Congress upon the judicial function of the court" (323 U. S. 1, 4). This Court granted certiorari (R. 61; 321 U. S. 761) and, on November 6, 1944, ruled that the Special Act was constitutional (323 U. S. 1), holding that it created a "new obligation of the Government * * * where no obligation existed before" (*id.* 9). On December 6, 1944, the mandate of this Court, remanding the case for further proceedings in conformity with its opinion of November 6, was filed (R. 63).

On resubmission to the court below (R. 63), that court found that (1) the excavation of the materials necessitated by the lowering of the "B" line "would have had to be paid for under the contract if the contracting officer had not changed the plans by lowering the B line"; (2) the removal of the materials caved in from the side walls "was made necessary by the contracting officer's direction to * * * omit the side wall timber lagging"; (3) the filling of these caved-in spaces with concrete "was directed by the contracting officer"; and (4) the dry-packing and grouting of the spaces left vacant by the cave-

ins from above the tunnel were "done at the direction of the contracting officer or his representative" (R. 66–67). The court below further found that "the removal of the materials which caved in from above the tunnel * * * was not made necessary by any direction or default on the part of agents of the Government"; and that none of the work mentioned had been paid for, "but, as to the work of disposing of the materials which caved in from the top of the tunnel, [petitioner] will have been paid for that work what he expected to receive under the contract and what he was entitled to receive at contract rates, when he is paid the contract rates for dry packing and grouting the spaces left by the cave-ins" (R. 67). The court below found that the "unit prices named in the contract" were, for excavating, $17, for concrete work, $17, for dry-packing, $3, all per cubic yard, and for grouting, $3 per bag of cement (R. 65, 3). At these rates it allowed all the petitioner's claims, except that seeking additional compensation for removing 4,781 cubic yards of materials which caved in over the tunnel arch, and granted judgment to petitioner in the amount of $81,339.80 (R. 67–83). Two judges dissented in part (R. 84–110).

ARGUMENT

We submit that the question presented is of no general importance and that the decision below is correct.

1. The question presented involves the construction of the Special Act of February 27, 1942, merely to ascertain whether it was the intention of the Congress to provide therein that the court below, in determining and rendering judgment "at contract rates" upon the claims of petitioner, was, in addition to compensating petitioner for dry-packing and grouting the overhead caved-in spaces at $3 per cubic yard plus $3 per bag of cement, required to compensate him at $17 per cubic yard for removing the materials which fell from the spaces dry-packed and grouted. The claim for the latter additional compensation, presently asserted by petitioner, was not asserted by him either in his previous suit (No. K–366) in the Court of Claims (R. 64, 110–122) or, as the court below found, before Congress (R. 78–80). The current question presented by petitioner is one neither of importance nor of any general significance. It is unique, involving no general principles, and its resolution will resolve no controversies presently pending or likely to arise in the future. In these circumstances, we submit that a writ of certiorari should not be granted. The controversy between petitioner and the United States has three times occupied the attention of the Court of Claims (76 C. Cls. 64; 100 *id.* 375; R. 110–145, 63–110) [3] and three times (in-

[3] In addition, petitioner made four motions for new trial. 76 C. Cls. 64; 81 *id.* 658; 86 *id.* 18; 100 *id.* 375, 390.

cluding the present petition) that of this Court (303 U. S. 654; 321 U. S. 761; 323 U. S. 1); it "has long been pending and should be brought to an end". See *Lindheimer* v. *Illinois Tel. Co.*, 292 U. S. 151, 175.

2. The decision of the court below is correct. Section 2 of the Special Act directed the court below "to determine and render judgment at contract rates" upon the petitioner's claims

> for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

This Court held the Act to be constitutional (323 U. S. 1), as it created "a new obligation of the Government to pay petitioner's claims where no obligation existed before", and held that the congressional power "to provide for the payment of debts * * * is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary". (*Id.* 9.) The Court stated that Congress had created "a legal, in recognition of a moral, obligation to pay petitioner's claims" (*id.* 10). Cf. *United States* v. *Realty Company*, 163 U. S. 427, 440. These principles require that the Special Act be interpreted as recognizing a legal obligation coextensive with the moral obligation of the Government. The court below, in allowing all the petitioner's claims, except that for the removal, as such, of the caved-in material from over the tunnel arch, clearly gave recognition to the equitable and moral considerations upon which those claims are founded (R. 66–67). No equitable ground or moral obligation exists, however, which is susceptible of conversion into a legal obligation to pay for the removal, as such, of the caved-in over-head materials.

Petitioner's contract with the United States (R. 9–46) clearly provided "that no excavation removed beyond the 'B' line [such as the materials

which caved in from above the tunnel, for whose removal petitioner presently seeks additional compensation] will be paid for" (R. 38, 72). Moreover, the petitioner in his former suit in the Court of Claims (No. K–366) not only did not assert a claim for the removal as such of these caved-in materials, but expressly disclaimed any right to separate compensation for their removal (R. 110–122, 72–75; 100 C. Cls. 375, 385–386).

The petitioner asserts, however (Pet. 4–5, 11–13), that his right to separate pay for the removal of the caved-in materials is founded not on the contract but on the Special Act. A short answer to this is that the Special Act requires the Court of Claims to render judgment "at contract rates" (sec. 2) and, as pointed out by the court below, there was no contract rate provided for removal of caved-in over-head materials other than the rates provided for dry-packing and grouting the caved-in spaces (R. 75–76, 78, 83). Moreover, the Act fails to reveal a congressional intention that petitioner should be separately compensated for the removal of the caved-in materials. In presenting his claim to Congress, petitioner asked merely that Congress "direct the court to consider the case again and grant him relief as was denied him heretofore" (R. 78). Petitioner further, in stating the effect of the pending bill, said that it "would enable the court to determine the amount of dry packing by the so-called liquid

method 'as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.' From such evidence as has heretofore been presented to the court, and from such additional evidence as may be required, it would seem that the court can reasonably determine what dry packing and grout were supplied by the contractor for which he has never been paid" (R. 79). Petitioner made no reference to his separate claim now presented for the disposition of the materials which fell from the top of the tunnel (R. 79). It is difficult to believe that petitioner, who has exhibited marked assiduousness in prosecuting his claims before both the judicial and legislative branches of the Government, would, in his statement to Congress, have left to inference a claim intended to be asserted by him which, in terms of money, amounts to approximately one-half of the total claim asserted by him in the court below. On the contrary, it is clear from the fact that petitioner asked Congress merely to direct the Court to grant him such relief as had theretofore been denied him (in Case No. K–366) that petitioner was not asserting claims before Congress different from those he had asserted (in Case No. K–366) in the Court of Claims.

That the petitioner's claims were so understood by Congress is also manifest. Both the House and Senate Reports on the Special Act refer to the fact that it "would enable the court to correct its error" (R. 80; H. Rep. No. 865, 77th Cong., 1st Sess., p. 3; S. Rep. No. 1019, 77th Cong., 2d Sess., p. 2).[4] Since the Court of Claims could not have committed error with reference to a claim never presented to it, the congressional intention did not encompass the instant claim. Certainly the language of the Special Act

---

[4] The items as to which the House and Senate Committees indicated petitioner was to be given a right to recover were stated in the committee reports as follows:

> There is no questioning the fact that he was put to additional items of expense by reason of the change orders of the contracting officer; that the claimant did supply certain dry packing (stones put into place) and grout (liquid cement mortar pumped into the spaces between the dry packing); that this was done under orders and supervision of the contracting officer; and it was accepted by the Government inspectors after inspection thereof.
>
> The reported bill would enable the court to correct its error; reimburse him for the expenses to which he was put as the result of the change orders; determine the amount of dry packing "by the liquid method as described by the court and based on the volume of grout actually used"; and determine the amount of grout supplied as established "by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing." (H. Rep. No. 865, 77th Cong., 1st Sess., p. 3; S. Rep. No. 1019, 77th Cong., 2d Sess., p. 2).

The court below awarded judgment to petitioner on the items mentioned (R. 80–81).

itself gives no indication that petitioner was to be paid for the removal of the materials which caved in from over the tunnel apart from the compensation petitioner received for dry-packing and grouting the vacated areas. And any claimed ambiguity in the Act in this respect must be resolved against petitioner, not only in view of the history of the Act, but also in view of the "familiar rule" that "every public grant * * *, if ambiguous, is to be construed against the grantee and in favor of the public." See *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 49; *Shearer* v. *United States*, 87 C. Cls. 40, 80.

Section 2 of the Special Act provided that petitioner was to obtain judgment "at contract rates" "for certain work performed for which he has not been paid." The court below granted judgment to petitioner for dry-packing and grouting the areas left vacant by the over-head cave-ins (R. 70–71). As petitioner understood his contract with the United States, as he stated his claim to Congress, and as it was understood by Congress, it is plain that, in the words of the court below (R. 83), "the contract rate for removing caved-in materials was included in the unit prices which he [petitioner] bid for dry packing and grouting, so that if he gets paid for those processes he will have been paid the 'contract rate' for excavating the mate-

rials. * * * When we so interpret the special act as to make the plaintiff's former claims and testimony, his former failure in this court, his statement to Congress, the report of the Committee, which that statement induced, and the special act, one consistent whole, we have no doubt that we are giving to the plaintiff the full measure of relief which Congress intended him to have."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

PAUL A. SWEENEY,
ABRAHAM J. HARRIS,
Attorneys.

DECEMBER 1945.